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Mirisch.  
P.L.I.

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE: B-190304**

**DATE: February 17, 1978**

**MATTER OF: Carl Weissman & Sons, Inc.**

**DIGEST:**

Although Small Business Administration decision that contractor is ineligible for certificate of competency procedures does not preclude GAO review of nonresponsibility determination, such determination will not be overturned absent showing of bad faith or lack of reasonable basis therefor.

Carl Weissman & Sons, Inc. (Weissman), protested before award with respect to request for proposals (RFP) F39601-77-09005, issued by the Department of the Air Force, Ellsworth Air Force Base, South Dakota (Air Force), on February 16, 1977, for management of its Contractor Operated Civil Engineer Supply Store (COCESS). On September 10, 1977, the contracting officer issued a determination of nonresponsibility excluding Weissman from consideration for award, although it was the low offeror.

Weissman protests the determination on the grounds that the contracting officer acted in an arbitrary and capricious manner and did not exercise sound, prudent judgment, in that he issued the determination prior to receipt of a preaward survey requested on September 12, 1977, and submitted to the contracting officer on September 30, 1977.

The determination of nonresponsibility was based on an earlier similar determination, dated May 4, 1977, made by another contracting officer with respect to a COCESS procurement at Malmstrom Air Force Base, Montana.

B-190304

We declined to review this determination in Carl Weissman & Sons, Inc., B-189242, August 29, 1977, 77-2 CPD 156.

In that case, the determination had been forwarded to the Small Business Administration (SBA) pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4(c)(vi) (1976 ed.), and SBA declined to appeal on Weissman's behalf. We decided that SBA's decision precluded our review since there was no allegation or showing of fraud or bad faith on the part of procurement officials.

In the present case, the contracting officer referred his determination to SBA as required by section 8(b)(7)(A) of the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1970), as amended by Pub. L. No. 95-89, to expand SBA's authority to issue certificates of competency (COC) to include all elements of responsibility. Prior to this amendment, a COC was conclusive on a contracting agency only with respect to capacity and credit. SBA notified Weissman on September 28, 1977, that it was ineligible for COC consideration because it appeared to be a nonmanufacturing company that would supply end products some of which were not produced by small business concerns. Weissman did not contest the stated basis for COC ineligibility, and we assume that it was in fact ineligible.

Since SBA did not reach the merits of Weissman's claim of responsibility, we are obviously not precluded from so doing. However, the scope of our review of agency determinations of nonresponsibility is quite narrow. In general, we will not question such determinations absent a showing of bad faith or lack of reasonable basis therefor. 43 Comp. Gen. 228 (1963).

In the present case, Air Force concedes that the contracting officer's issuance of a determination of nonresponsibility prior to completion of the preaward survey was procedurally incorrect. The

B-190304

contracting officer should have reviewed the survey prior to submitting his determination to SBA. However, Air Force also correctly points out that the contracting officer is required to make a determination of nonresponsibility unless the information he receives clearly indicates the contractor's responsibility. ASPR § 1-902 (1976 ed.). Likewise, a preaward survey is only required where the contracting officer lacks sufficient information from other sources to make a determination, ASPR § 1-905.4 (1976 ed.), or where, as here, a determination of nonresponsibility is required to be referred to SBA.

The preaward survey was performed by a command that had no prior experience with Weissman, and simply relayed information gathered from other installations. The survey recommended that award be made to Weissman, but, as Air Force points out, the survey took no note of the negative performance and integrity information contained in the earlier nonresponsibility determination at Malmstrom, upon which the contracting officer based his decision in the present case.

Under the circumstances, we cannot say the determination of nonresponsibility was made in good faith or without a reasonable basis. The contracting officer relied upon reasonably contemporaneous information as to Weissman's performance under similar contracts with other bases. Further, it appears from the record that the preaward survey was in fact considered, albeit tardily, and that the contracting officer found that the survey's conclusions did not rebut the information in the earlier Malmstrom determination. In similar circumstances, we have declined to overturn a negative determination of responsibility. B-172061, August 24, 1971.

We must point out, however, that continued reliance on the Malmstrom determination to deny Weissman future contracts could violate the rule that responsibility determinations should be based on information made available as closely as practicable to the contract award. See Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 363; 53 Comp. Gen. 344 (1973).

B-190304

Accordingly, the protest is denied.

*R. F. K. 11/11/42*  
Deputy Comptroller General  
of the United States

